Supreme Court, U.S.
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No. 99-218

In the Supreme Court of the United States

VICKI LOPEZ-LUKIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in instructing the jury on the offense of "honest services" mail fraud, see 18 U.S.C. 1341 and 1346, the district court erred by failing to define the phrases "honest services" and "official capacity."

2. Whether a government official who makes false statements to the press about her romantic involvements may be found to have thereby deprived her constituents of their right to her "honest services," in violation of the federal mail fraud statute.

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OPINIONS BELOW

The per curiam judgment of the court of appeals (Pet. App. 1a-2a) is unreported, but the decision is noted at 170 F.3d 186 (Table). The opinion of the court of appeals on denial of rehearing (Pet. App. 3a-10a) is unreported. Two earlier opinions of the court of appeals in this case are reported at 102 F.3d 1164 and 113 F.3d 1187.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1999. A petition for rehearing was denied on May 5, 1999 (Pet. App. 3a-10a). The petition for a writ of certiorari was filed on August 3, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341 and 1346.[1] She was sentenced to 27 months' imprisonment. Gov't C.A. Br. 3. The court of appeals affirmed. Pet. App. 1a-2a.

1. In August 1990, the Board of County Commissioners (BOCC) of Lee County, Florida, entered into a $197 million contract with Ogden Martin for the construction of an incinerator in Lee County. The construction of the incinerator was opposed by Waste Management Resources, which had a contract with Lee County to handle all of the County's landfill needs. During the summer of 1990, petitioner successfully ran for a seat on the BOCC as an anti-incinerator candidate. During the campaign, she began a secret romantic relationship with Bruce Strayhorn, Waste Management's lobbyist. At her first BOCC meeting, petitioner voiced her opposition to the incinerator. After a newspaper published an article exposing petitioner's relationship with Strayhorn, the two ended the relationship. Gov't C.A. Br. 3-5.

Ogden Martin subsequently hired co-defendant Sylvester Lukis as a lobbyist. Lukis also worked as a consultant for bond underwriting firm Goldman Sachs, which likewise was seeking to do business with Lee County. Petitioner and Lukis (who would marry after

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[1] The jury acquitted petitioner on one count of accepting a bribe concerning programs receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(B), and on eight counts of using a facility in interstate commerce to carry on an unlawful activity, in violation of the Travel Act, 18 U.S.C. 1952(a)(3). See Pet. 3 & n.1; Gov't C.A. Br. 1-3.

the events in this case) began a romantic relationship that they kept hidden from Ogden Martin, Goldman Sachs, and the public. The two spoke to each other frequently over petitioner's county-issued cellular telephone. After the results of a County audit of petitioner's use of the telephone were published in a newspaper, Lukis told petitioner that he would pay the telephone bill. To avoid exposing their relationship, he funneled the money to petitioner through one of her friends, falsely noting on the check that it was for a "Lee reception." Lukis gave petitioner additional sums of money on several occasions, each time funneling the money through petitioner's friend and several times annotating the check with a false purpose for its issue. Petitioner did not report the money she received from Lukis as income on her 1991 financial disclosure form or her 1991 income tax return. Gov't C.A. Br. 5-8, 17.

In the spring of 1991, Goldman Sachs sought to obtain bond underwriting work from Lee County. Petitioner arranged for Goldman Sachs representatives to meet with County officials. After the County Administrator told Lukis that Goldman Sachs could not be brought in on the incinerator project, petitioner approached the County Administrator, telling her that she was not being fair to Goldman Sachs and that the County Commissioners should have more input in the selection of bankers for the county. Petitioner then proposed to the BOCC that it reexamine the County's method of selecting bond underwriters and advocated a method of selection proposed by Goldman Sachs. Petitioner and other BOCC members proceeded to create a Bond Selection Committee to wrest control over the selection of bond underwriters from the County Administrator. A month later, the BOCC, including petitioner, voted to proceed with the construction of the

incinerator. Petitioner sent the Financial Advisor a document prepared by Goldman Sachs that was critical of a provision contained in the Financial Advisor's proposed questionnaire for use in selecting bond underwriters for the County. The Financial Advisor subsequently removed the provision from the questionnaire. Petitioner later took additional steps to help Goldman Sachs obtain county business. Gov't C.A. Br. 8-12, 15-17.

In September 1991, petitioner responded to a list of questions submitted by a reporter investigating her relationship with Lukis. She falsely asserted, *inter alia*, that she did not recall when she had met Lukis, did not know what his relationship was with Goldman Sachs, and did not know when she had become aware of his relationship with Ogden Martin. Gov't C.A. Br. 12-13.

Around April 1992, petitioner and Lukis broke off their relationship, and petitioner resumed her romantic relationship with Strayhorn. A private investigator hired by Lukis videotaped Strayhorn in a romantic encounter with an anti-incinerator candidate for the BOCC, Susan Anthony. After learning about the videotape, petitioner told Strayhorn that if Anthony did not drop out of the BOCC race by the end of that week, petitioner would release the tapes to the media. Anthony refused to drop out of the BOCC race, and petitioner arranged for the videotape to be distributed to newspapers and television stations in the area. Anthony later reported petitioner's extortionate threats to the State Attorney's Office. In a subsequent radio interview, petitioner lied about her involvement with the videotape, alleging that the blackmail allegations had been precipitated by petitioner's vote to put the Waste

Management landfill contract out for bid. Gov't C.A. Br. 17-21.

2. The government's theory of prosecution on the mail fraud count was that petitioner and Lukis had engaged in a fraudulent scheme to deprive the citizens of Lee County of their intangible right to petitioner's honest services as a Lee County Commissioner, and that in furtherance of that scheme they had used the United States mail. See Pet. App. 18a.[2] The indictment alleged that it was part of the fraudulent scheme that petitioner would agree to accept pecuniary benefits from Lukis to influence her performance as a Lee County Commissioner (*id.* at 19a); that petitioner and Lukis would conceal their "monetary and intimate relationship" from the citizens of Lee County (*ibid.*); and that petitioner and Lukis would use the videotape of Anthony and Strayhorn to force Anthony to withdraw as a BOCC candidate, thereby affecting the composition of the BOCC (*id.* at 20a).

3. In its instructions on the mail fraud count, the district court explained to the jury that, in order to

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[2] The federal mail fraud statute establishes criminal penalties for any person who, "having devised or intending to devise any scheme or artifice to defraud, * * * places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing." 18 U.S.C. 1341. The statute further provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

convict, it must find beyond a reasonable doubt that "the defendants knowingly and willfully devised a scheme to defraud the citizens of Lee County of their intangible right to [petitioner's] honest services in her official capacity." 4/15/97 Tr. 2190 (Pet. App. 45a). The court defined the word "scheme" as a "plan or course of action intended to deceive others and to [deprive] by false and fraudulent pretenses, representations or promises, the citizens of Lee County of their intangible right of honest services." *Ibid.* The court further instructed that, in order to find the requisite intent to commit "honest services" fraud, the jury must conclude that petitioner "solicited or accepted benefits with the intention of being influenced in her official duties." 4/15/97 Tr. 2191 (Pet. App. 46a). The district court also instructed the jury that

> [t]he defendants have [pled] not guilty to the charges of the indictment and have maintained their not guilty pleas throughout this trial. They claim that various of the acts described here during the course of the trial were made as part of their ongoing romantic relationship, which if true would mean it would constitute a complete defense.

4/15/97 Tr. 2176.

The district court did not give petitioner's proposed instruction on "honest services" mail fraud, which read in pertinent part:

> To "defraud the citizens of Lee County of their intangible right to honest services" means that Mr. and Mrs. Lukis must have devised a scheme to influence Mrs. Lukis's performance of her official functions, so that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of

> the Lee County Board of County Commissioners. In particular, in order to return a guilty verdict on this count, you must first find that the prosecution has proven beyond a reasonable doubt that Mr. and Mrs. Lukis devised a scheme whereby Mrs. Lukis would solicit, and Mr. Lukis would give, financial payments based on an understanding that Mrs. Lukis's actions as a County Commissioner would be influenced by such payments.

Pet. App. 27a.

The court also declined to give the supplemental instruction later proposed by petitioner, which read in pertinent part:

> To "defraud the citizens of Lee County of their intangible right to honest services" means that Lukis and Lopez-Lukis must have devised a scheme to influence Lopez-Lukis's performance of her official duties as Lee County Commissioner through the making of illegitimate payments to her, such that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners.

Pet. App. 30a.

4. On appeal, petitioner contended that the district court's mail fraud instructions were deficient in that they contained no definition of petitioner's "honest services" in her "official capacity." Petitioner argued that the instructions given by the district court improperly permitted the jury to convict her of mail fraud if it found that she had engaged in noncriminal forms of dishonesty, such as lying to the press about her relationship with Lukis. See Pet. C.A. Br. 25-34. The government contended that the instructions adequately

communicated the elements of the mail fraud offense, explaining that "[b]ecause the instructions required the jury to find that the scheme charged in the indictment was intended to influence her in her official duties, the jury could not have convicted [petitioner] for simply lying to the press or failing to disclose her relationship with Lukis." Gov't C.A. Br. 30. The court of appeals affirmed without opinion. Pet. App. 1a-2a.

5. Petitioner filed a petition for rehearing and suggestion for rehearing en banc. Petitioner asserted that "[i]t is absolutely clear that the district court's failure to define the phrases 'honest services' and 'official capacity,' which the prosecutor inappropriately exploited during summation, caused the jury to convict [petitioner] of lying to the media." Pet. for Reh. 9. She argued that "[b]y issuing a per curiam affirmance, the panel apparently rejected out of hand the legal analyses that have caused other courts of appeals to limit 'honest services' to conduct that deprives the public of its right to have decisions regarding matters of public concern made in a disinterested, honest fashion." *Id.* at 11. Petitioner also contended that the panel had acted improperly by deciding the case in an unpublished per curiam order because "[t]he question of whether a public official's lying to the news media constitutes 'honest services' mail fraud is a substantial legal issue that would benefit from an opinion by [the court of appeals]." *Id.* at 13.

The court of appeals denied rehearing and rehearing en banc. Pet. App. 3a-10a. The court stated that

> [t]he flaw in [petitioner's] petition for rehearing with respect to this issue lies in the petition's unwarranted assumption that the panel decided that a public official could be convicted of "honest services

> mail fraud" based upon dishonest statements to the media and the public about a private romantic affair. The panel did not decide that.

Id. at 5a-6a. Rather, the court explained, the government's theory of prosecution was that petitioner had engaged in a scheme to defraud by "accept[ing] benefits to influence her performance of *official* acts as a member of the Board of County Commissioners." *Id.* at 6a. The court stated that "[t]he jury instructions emphasized that the government must prove that [petitioner] solicited or accepted benefits with the intention of being influenced in her *official* duties," and that "[t]here was ample evidence to support the jury's verdict that [petitioner] accepted benefits to influence her in her *official* actions." *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 15-21) that the district court's jury instructions were defective because they did not define the terms "honest services" and "official capacity." That claim lacks merit and does not warrant this Court's review.

The thrust of petitioner's proposed instructions was that she could be convicted of "honest services" mail fraud only if she solicited or accepted payments "to influence [her] performance of her official functions, so that the citizens of Lee County would be deprived of her honest judgment about the public issues that came before her as a member of the Lee County Board of County Commissioners." Pet. App. 27a; see also *id.* at 30a. The district court's instructions to the jury were substantially equivalent, requiring for conviction that the jury find that petitioner "solicited or accepted benefits with the intention of being influenced in her official duties." 4/15/97 Tr. 2191 (Pet. App. 46a). Indeed, when

petitioner proposed her supplemental instruction, the district court responded: "Isn't that in here already adequately?" Pet. App. 34a; see also *id.* at 35a ("I think [the charge] covers it."). A district court has wide discretion in formulating its instructions and is not bound by the wording of defense-authored instructions even if they accurately state the law. See, *e.g.*, *United States* v. *Starrett*, 55 F.3d 1525, 1551 (11th Cir. 1995), cert. denied, 517 U.S. 1111 and 517 U.S. 1127 (1996); *United States* v. *Thetford*, 676 F.2d 170, 178 (5th Cir. 1982), cert. denied, 459 U.S. 1148 (1983); *United States* v. *Czeck*, 671 F.2d 1195, 1197 (8th Cir. 1982). In the present case, the district court's determination that the instructions as given adequately set forth the elements of "honest services" mail fraud, and that petitioner's proposed instructions were accordingly unnecessary, was well within the court's discretion.

Petitioner contends (Pet. 15-16) that the instructions given to the jury were defective because they did not specifically define the term "official capacity." The phrase "official capacity," however, is not used in 18 U.S.C. 1341 or 1346, and it is not a "specialized legal term[]" (Pet. 2) that requires additional definition in every case. While a court might permissibly elect to amplify that term, the district court did not abuse its discretion here in failing to provide a specific definition of it. See *United States* v. *Lignarolo*, 770 F.2d 971, 980 (11th Cir. 1985), cert. denied, 476 U.S. 1105 (1986); see also *United States* v. *Marino*, 639 F.2d 882, 888 (2d Cir), cert. denied, 454 U.S. 825 (1981); *United States* v. *Johnson*, 575 F.2d 1347, 1357-1358 (5th Cir. 1978), cert. denied, 440 U.S. 907 (1979). That is especially so since the court also made clear that the defendants "claim that various of the acts described here during the course of the trial were made as part of their ongoing

romantic relationship, which if true would mean it would constitute a complete defense." 4/15/97 Tr. 2176.

Petitioner's reliance (Pet. 16-17) on *United States* v. *Sawyer*, 85 F.3d 713 (1st Cir. 1996), is misplaced. In *Sawyer*, the indictment charged that the defendant, a lobbyist, engaged in "honest services" mail and wire fraud through a scheme intended to cause state legislators to violate their duties to the public. To establish the scheme, the government sought to prove that the defendant intentionally violated or caused the legislators to violate the Massachusetts gift statute and the Massachusetts gratuity statute. The court's instructions allowed the jury to find an intent to defraud from the intent to violate the gift statute. The court of appeals held that this was error, explaining that "to prove the intent to commit honest services fraud, the jury had to find that [the defendant] *intended to influence or otherwise improperly affect the official's performance of duties*, not merely that he intended to violate the state statute." *Id.* at 729. Here, by contrast, the district court made clear that petitioner could be convicted on the mail fraud count only if she "solicited or accepted benefits with the intention of being influenced in her official duties." 4/15/97 Tr. 2191 (Pet. App. 46a).

Petitioner's reliance (Pet. 17-20) on the instructions given in *United States* v. *Bolden*, No. 97-CR-0218 (N.D. Ill. Jan. 1, 1998); *United States* v. *Woodward*, No. 95CR10234-DPW (D. Mass. Feb. 7, 1997); and *United States* v. *Santiago*, No. 97-CR-441 (N.D. Ill. Jan. 27, 1999), is also misplaced. The instructions given by the district courts in those cases (see Pet. App. 76a-89a) were indeed more elaborate than the instructions given here. But the fact that other courts have chosen to give more extensive instructions does not mean that those

courts would regard the instructions given here as legally inadequate.[3]

2. Petitioner also contends (Pet. 22-26) that review by this Court is warranted on the question whether a conviction for "honest services" mail fraud can be

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[3] Petitioner claims (Pet. 10) that the government stated in its closing argument that the jury could convict her of "honest services" mail fraud simply because she lied to the press about personal matters. Petitioner, however, made no contemporaneous objection to any of government counsel's purportedly improper statements, and none of those comments rises to the level of plain error. The government repeatedly stressed in its summation that its theory of prosecution was that petitioner had accepted money to influence her actions in connection with official matters before the BOCC. See, *e.g.*, 4/15/97 Tr. 2113 ("I'm talking about her actions in her official capacity as a County Commissioner, changing her vote on the incinerator project, lying to an entire community * * * about the reasons for her official actions."); *id.* at 2114 ("The official actions of Ms. [Lopez-Lukis] are what we're concerned with"); *ibid.* ("The things she did in the scope of her official capacity is what we ask you to focus on."); *id.* at 2121 ("The unavoidable facts [are] that Sylvester Lukis paid her, and she acted for Ogden Martin and Goldman Sachs, exposing their views, making their introductions, providing them information, utilizing the information which they gave her, and voting for their interests."). The government also argued to the jury that petitioner attempted to conceal her bribery scheme by lying to the press and others, and it made clear that petitioner's "official capacity" included more than "votes." See Pet. App. 47a, 48a, 50a. But the government's overall argument did not contend that the jury could convict petitioner on the mail fraud count for lies alone without also finding that she accepted payments from Lukis with the intention of being influenced in her official acts as a County Commissioner. See *id.* at 6a (court of appeals observes on denial of rehearing that the allegation that petitioner "accepted benefits to influence her performance of *official* acts as a member of the Board of County Commissioners * * * was the government's theory of prosecution and the clear meaning of the government's argument to the jury").

predicated on a public official's lies to the press about his private life. She asserts (Pet. 22) that "[t]he worthiness of this issue for review by this Court is made plain by the fact that the summary affirmance of petitioner's conviction could subject virtually every local, state, and federal office holder in the states of the Eleventh Circuit to criminal prosecution for misleading or incomplete statements to the media."

The government's brief in the court of appeals, however, did not contend that petitioner could properly be convicted of mail fraud based on her false denials of a romantic relationship. Rather, the government argued that "[b]ecause the instructions required the jury to find that the scheme charged in the indictment was intended to influence her in her official duties, the jury could not have convicted [petitioner] for simply lying to the press or failing to disclose her relationship with Lukis." Gov't C.A. Br. 30. More importantly, in its opinion on denial of rehearing, the court of appeals specifically disavowed the holding attributed to it by petitioner, explaining that

> [t]he flaw in [petitioner's] petition for rehearing with respect to this issue lies in the petition's unwarranted assumption that the panel decided that a public official could be convicted of "honest services mail fraud" based upon dishonest statements to the media and the public about a private romantic affair. The panel did not decide that.

Pet. App. 5a-6a. The question whether a public official deprives his constituents of "honest services" by making false statements to the press about his private

life is therefore not a basis on which the appellate affirmance turned.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1999

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[4] Neither petitioner's acquittal on the bribery and Travel Act counts (which alleged bribery as the underlying "unlawful activity"), nor the post-trial press interviews with jurors on which she relies (see Pet. 11, 26), advance petitioner's claim that the jury convicted her of mail fraud for lying to the press about her personal life, rather than for accepting money to influence her performance of official duties. Even assuming that the verdicts were inconsistent, it is well settled that a defendant convicted by a jury on one count may not attack the conviction on the ground it was inconsistent with the jury's verdict of acquittal on another count. See *United States* v. *Powell*, 469 U.S. 57, 62 (1984). Rather, where inconsistent verdicts have been reached, "[t]he most that can be said * * * is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt." *Id.* at 63 (quoting *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)). With respect to the post-trial juror interviews, Federal Rule of Evidence 606(b) adopts the common-law rule that, except in cases where an extraneous influence is alleged to have affected the jury, juror testimony is inadmissible to impeach a verdict. See *Tanner* v. *United States*, 483 U.S. 107, 117 (1987).